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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 192

HERBERT LESTER TYSON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER.

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INDEX.

SUBJECT INDEX.

	Page
Opinion of the court below	1
Jurisdiction	1
Statement of the case	2
Specifications of error	3
Argument	4
1. The suspension of the statute of limitations provided in Chapter 320, Section 19, 43 Stat. 612 (Title 38 U. S. C. A., Sec. 445, as amended), did not expire upon action by the director denying the claim, but upon the expiration of the number of days usually required by the post office department for transmission of mail from Washington, D. C., to the insured's last address of record	4
2. The filing of the claim in the bureau on July 3, 1932, suspended the running of the statute of limitations against instituting suit for one day following receipt of notice of denial by the insured	7
Conclusion	9
Appendix	10

AUTHORITIES CITED.

Albek v. U. S., 4 F. Supp. 1020	5
American Tobacco Co. v. Werckmeister, 207 U. S. 284, 52 L. Ed. 208	7
Bonwit Teller & Co. v. U. S., 283 U. S. 258, 265, 75 L. Ed. 1018, 1022	9
Burnet v. Willingham Loan & Trust Co., 282 U. S. 438, 440, 75 L. Ed. 449, 450	8
Creasy v. U. S., 4 F. Supp. 175	5
Decisions Insurance Claims Council, Nos. 2106, 3107, November 1,1931	6
Gill v. Bank of U. S., 12 Wheat. 511	8
Notes, 49 L. R. A. 193, 1 L. R. A. (N. S.) 835	8
Silson v. U. S., 70 F. (2d) 176	4
Tyson v. U. S., 76 F. (2d) 533	1
Weaver v. U. S., 72 F. (2d) 20	7
U. S. v. Collins, 61 F. (2d) 1002	4
U. S. v. Jackson, 280 U. S. 183, 74 L. Ed. 361	6
U. S. v. Knott, 69 F. (2d) 907	4
U. S. v. Walker, 77 F. (2d) 415	5

STATUTE CITED.

38 U. S. C. A., Sec. 445	3, 4, 8, 10

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THE UNITED STATES OF AMERICA.

BRIEF OF PETITIONER.

I.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, dated April 2, 1935, is reported in 76 F. (2d) 533, and is found at pages 21 to 25 of the record.

II.

Jurisdiction.

Jurisdiction is set forth in the Brief in Support of Petition for Writ of Certiorari herein.

III.

Statement of the Case.

This action was instituted by Herbert Lester Tyson for the recovery of benefits under a policy of War Risk Insurance issued to him by the United States of America.

On December 2, 1930, in response to a request of the insured the Veterans Administration wrote a letter to the insured advising him that the local rating board was of the opinion that he was not entitled to compensation. With this letter were enclosed forms 526-c and 526-f, which the insured was directed to execute and return if he desired to apply for disability allowance. Insured executed and forwarded these forms to the Veterans Administration by which they were filed on December 12, 1930.

Thereafter, on July 2, 1931, insured executed and mailed to the Veterans Administration a claim on Form 579 (Exhibit "8") for insurance benefits under his policy of insurance, alleging total and permanent disability under the policy. This claim was filed in the Veterans Bureau on July 3, 1931. The director, by letter dated November 12, 1932, denied the claim and advised the insured:

> "You may consider such denial final for the purposes of instituting suit under section 19 of the World War Veterans Act, 1924, as amended. If you accept the denial of the claim by the Council as final the suspension of the Statute of Limitations provided by section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C., to your last address of record."

This letter was post-marked in Washington, D. C., on November 14, 1932, and was received by the insured at his last address of record on November 16, 1932. The follow-

ing day suit was commenced in the District Court of the United States for the Eastern District of North Carolina, Raleigh Division.

Upon the foregoing facts the District Court dismissed the action for lack of jurisdiction and upon appeal by the insured the Circuit Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court. The Circuit Court held that the claim is denied by the director "when he takes action denying it, not when notice of the denial is received by the insured."

The Circuit Court further held that if the date of receipt of the letter by the insured be taken as the last date of the suspension of the statute of limitations, the suit was properly dismissed as the time for bringing the action expired on the date the insured received the denial.

A petition for a wit of certiorari was thereafter filed in this Court which petition was allowed.

IV.

Specifications of Error.

1. *The suspension of the Statute of Limitations provided in Chapter 320, Section 19, 43 Stat. 612 (Title 38, U. S. C. A. Sec. 445, as amended) did not expire upon action by the director denying the claim, but upon the expiration of the number of days usually required by the post office department for the transmission of mail from Washington, D. C., to the insured's last address of record.*

2. *The filing of the claim in the Bureau on July 3, 1931, suspended the running of the Statute of Limitations against instituting suit for one day following receipt of notice of denial by the insured.*

VI.

ARGUMENT.

1. The suspension of the Statute of Limitations provided in Chapter 320, Section 19, 43 Stat. 612 (Title 38, U. S. C. A., Sec. 445, as amended), did not expire upon action by the director denying the claim, but upon the expiration of the number of days usually required by the Post Office Department for the transmission of mail from Washington, D. C., to the insured's last address of record.

As set forth in the record the Circuit Court of Appeals held that the suspension of the statute of limitations expired when the director took action denying the claim and not when the notice of denial is received by the insured.

In order to prosecute his suit it was necessary for the insured to show the existence of disagreement between the Bureau and himself. Disagreement arose when the Director of the Bureau denied insured's claim for insurance benefits. This denial was a prerequisite to maintaining his action and the denial could only be shown from the letter of the director.

> "It is clear that the District Court has no jurisdiction to entertain the suit in the absence of proof of the existence of the disagreement prior to the bringing of the suit."
>
> *U. S.* v. *Collins* (C. C. A. 4th) 61 F. (2d) 1002;
> *U. S.* v. *Knott* (C. C. A. 6th) 69 F. (2d) 907;
> *Silson* v. *U. S.* (C. C. A. 10th) 70 F. (2d) 176.

The duty of beginning the suit did not arise until notice of the denial had been communicated to the insured. Without such notice of denial there could have been no proof of

disagreement and the action could not have been maintained.

> "If the act of denial of the claim imposes upon the veteran the condition that he must sue within a limited time thereafter, surely, he cannot be expected to comply with this condition until such time as he has knowledge of the denial of his claim. In fact he cannot sue until he knows that his claim has been denied and is no longer under consideration at the Bureau. Only after he has received notice of the denial can he allege the disagreement which is essential to the maintenance of a suit. The claim is to be taken as denied on the date when claimant received the letter informing him of denial."
>
> *Creasy* v. *U. S.* (D. C. Va.) 4 F. Supp. 175.
> *Albek* v. *U. S.* (D. C. N. Y.) 4 F. Supp. 1020.

In a case similar to the one at bar in the Fifth Circuit the United States contended that the denial became effective on the date the letter was dated. The Circuit Court held that this position was not consistent with the law:

> "It is to be noted that under the statute the period of extension begins with the 'filing in the bureau of the claim sued upon' and ends, not with the order denying the claim, but with 'the denial of said claim by the director.' It well may be supposed that in enacting the statute the lawmakers had in mind the methods pursued in the bureau in dealing with such claims, that claims are transmitted by the claimants from all parts of the country, and that a claimant first learns of the bureau's action on his claim when he is informed of that action by the bureau, and that communications between claimants and the bureau generally are by mail. Nothing in the language of the statute indicates a purpose to make a denial of the claim effective prior to delivery of notice of it at the place of claimant's address.
>
> *U. S.* v. *Walker* (C. C. A. 5th) 77 F. (2d) 415.

In the case at bar the director in the letter of denial stated:

> "If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C. to your last address of record."

The above quoted portion of the letter of denial is almost identical with the language of a regulation of the Insurance Claims Council (Decisions Insurance Claims Council, Nos. 3106, 3107, November 1, 1931). Therefore it is clear that the department charged with the administration of the law construed the statute as contended by appellant. This Court has held that great weight should be given the construction consistently given a statute by the department charged with its administration unless the construction is clearly wrong or unless a different construction is plainly required.

U. S. v. *Jackson*, 280 U. S. 183, 74 L. Ed. 361.

It could not have reasonably been contemplated that the suspension of the statute of limitations would cease prior to notice of the denial. It was certainly not contemplated that the insured should be able to commence suit on his claim on the grounds that a disagreement existed prior to receipt of the letter from the director informing him of the existence of a disagreement. The suit was predicated upon the existence of a disagreement and until claimant had notice of its existence he could not commence the action.

U. S. v. *Walker, supra.*

The purpose of the statute was to compel the insured to exhaust his administrative remedies before resorting to

the courts. A suit would not lie until the insured could prove that he had exhausted these remedies and that there existed a disagreement between insured and the Bureau. This disagreement did not exist until notice of the denial was communicated to the insured.

Weaver v. *U. S.* (C. C. A. 4th) 72 F. (2d) 20.

The court is not confined to a literal reading of the statute, but may consider its objects and purposes, the things with which it is dealing and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

American Tobacco Co. v. *Werckmeister,* 207 U. S. 284, 52 L. Ed. 208.

It is to be observed that although the letter of denial is dated November 12, 1932, it was not actually mailed until November 14, 1932, as shown by the post mark. This lapse of two days cannot be charged to any neglect on the part of the appellant, and yet it is contended that by reason of an act purely within the control of the Bureau insured's suit is barred. Such a construction results in a grave injustice to those whom the statute was specially designed to benefit.

2. The filing of the claim in the Bureau on July 3, 1931, suspended the running of the Statute of Limitations against the institution of suit for one day following receipt of notice of denial of the claim by the insured.

In the opinion herein the Circuit Court held that even if the claim be treated as denied on the date of receipt,

November 16, 1932, the suit was nevertheless barred by the statute. The statute provides:

> "This limitation is suspended for the period elapsing between the filing in the Bureau of the claim sued upon and the denial of said claim by the director."
> 38 U. S. C. A. 445.

The claim was filed in the Bureau on July 3, 1931, the last day on which such claims might be filed. Thereupon the running of the statute of limitations was suspended until there was a denial of the claim by the director and there remained to the veteran the unexpired portion of the time he had in which to file claim. Certainly there remained to him the unexpired portion of July 3, 1931, and such unexpired portion remained after notice of denial. Unless fractions of a day are to be regarded in computing the time remaining then it must be held that one day remained. Ordinarily where an act is required to be done on a date and no question of priority arises fractions of a day are not computed but the entire day is counted.

Gill v. *Bank of U. S.*, 12 Wheat 511, and notes to 49 L. R. A. 193, and 1 L. R. A. (N. S.) 835.

> "When the period allowed for doing an act is to be reckoned from the making of a contract or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time and so may be excluded from computation."
> *Burnet* v. *Willingham Loan & Trust Co.*, 282 U. S. 438, 440; 75 L. Ed. 449, 450.

If the day on which the insured filed his claim in the Bureau is excluded from the computation then one day remained. Otherwise instead of the statute of limitations barring a claim "one year after July 3, 1930," (38 U. S. C. A. 445) the claim would be barred on July 3, 1931.

This Court has previously held that in such cases the entire day would be allowed for filing the claim or suit.

Bonwit Teller & Co. v. *U. S.*, 283 U. S. 258, 265, 75 L. Ed. 1018, 1022.

Conclusion.

It is therefore respectfully submitted that under the decisions herein cited the insured's suit was not barred by the statute of limitations but was begun within the time allowed by the statute, and therefore the decision of the Circuit Court should be reversed.

Respectfully submitted,

J. Melville Broughton,
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Wm. H. Yarborough, Jr.
Of Counsel.

APPENDIX.

Pertinent Statutes Quoted and Relied Upon.

38 U. S. C. A. 445 (43 Stat. 612, 43 Stat. 1302, 45 Stat. 964, 46 Stat. 992): *Actions on claims; jurisdiction; parties; procedure; limitations.* In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28, and section 765 of Title 28 so far as applicable. All persons having or claiming to have an interest in such insurance may be made parties to such suit and such as are not inhabits of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct. In all cases where the bureau acknowledges the indebtedness of the United States upon any such contract of insurance and there is a dispute as to the person or persons entitled to payment, a suit in the nature of a bill of interpleader may be brought by the bureau in the name of the United States against all persons having or claiming to have any interest in such insurance in the Supreme Court of the District of Columbia or in the district court in and for the district in which any such claimants reside: Provided, That no less than thirty days prior to instituting such suit the bureau shall mail a notice of such intention to each of the persons to be made parties to the suit. The circuit courts of appeal and the Court of Appeals of the District of Columbia shall respectively exercise appellate jurisdiction and except as provided in sections 346 and 347 of Title 28, the decree of the circuit

courts of appeals and the Court of Appeals of the District of Columbia shall be final.

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: Provided, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded; Provided further, That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the bureau shall have three years in which to bring suit after the removal of their disabilities. If suit is seasonably begun and fails for defect in process or for other reasons not affecting the merits, a new action, if one lies, may be brought within a year though the period of limitations has elapsed. Judgments heretofore rendered against the person or persons claiming under the contract of war risk insurance on the ground that the claim was barred by the statute of limitations shall not be a bar to the institution of another suit on the same claim. No state or other statute of limitations shall be applicable to suits filed under this section.

In any suit, action, or proceeding brought under the provisions of this chapter, subpoenas for witnesses who are required to attend a court of the United States in any district may run into any other district: Provided, That no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the court being first had upon proper application and cause shown. The word "district" and the words "district court" as used herein shall be

construed to include the District of Columbia and the Supreme Court of the District of Columbia.

Attorneys of the bureau when assigned to assist in the trial of cases, and employees of the bureau when ordered in writing by the director to appear as witnesses shall be paid the regular travel and subsistence allowance paid to other employees when on official travel status.

Part time and fee basis employees of the bureau, in addition to their regular travel and subsistence allowance when ordered in writing by the director to appear as witnesses in suits under this section, may be allowed, within the discretion and under written orders of the director, a fee in an amount not to exceed $20 per day.

Employees of the United States Veterans' Bureau who are subpœnæed to attend the trial of any suit, under the provisions of this chapter, as witnesses for plaintiffs shall be granted official leave for the period they are required to be away from the bureau in answer to such subpœnas.

The term "claim" as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term "disagreement" means a denial of the claim by the director or some one acting in his name on an appeal to the director. This section, as amended, with the exception of this paragraph, shall apply to all suits now pending against the United States under the provisions of the War Risk Insurance Act, as amended, or this chapter.